[2008] SC (Bda) 27 Com (24 April 2008)

In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2007 No. 357

IN THE MATTER OF THE BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

MONTPELIER REINSURANCE LTD.

Plaintiff/ Defendant in the Arbitration

-and-

MANUFACTURERS PROPERTY & CASUALTY LIMITED

Defendant/ Plaintiffs in the Arbitration

Date of Hearing: March 11, April 16, 2008
Date of Reasons: April 24, 2008

Mr. Jan Woloniecki, Attride-Stirling & Woloniecki, for the Applicant
Mr. John Riihiluoma, Appleby, for the Respondent

RULING

Introduction and Summary

1. The Applicant, Montpelier Reinsurance Ltd. ("Montpelier") applied by Originating Summons dated December 18, 2007 for the following principal relief:

   > "*(1) An Order pursuant to Article 11(4) of the UNCITRAL Model Law on International Commercial Arbitration appointing the third arbitrator in the arbitration which is referred to in the First Affidavit of Elizabeth Jane Andrewartha dated 17th December 2007, filed in support of the proceedings.*"

2. Montpelier is reinsured under two reinsurance contracts by the Respondent, Manufacturers Property and Casualty Limited ("MPCL"). It is common ground that the contracts contain arbitration agreements under which certain disputes ought to be adjudicated. Montpelier contended that the contractually agreed procedure for appointing the third arbitrator had broken down, this Court could only make the appointment itself under Article 11(4) of the Model Law, and could not take other steps to procure compliance with the contractual appointment procedure. This central submission was supported by reference to the leading academic commentary on the Model Law and the *travaux preparatoires* of the Model Law itself, but was an issue which did not appear to have been judicially decided in any case identified by two senior commercial counsel. MPCL disputed this interpretation, but in any event contended that there was no clear evidence that a deadlock had been reached. At the initial hearing on March 11, 2008, I expressed my provisional view that the lot drawing procedure provided for by the arbitration clause was arguably mandatory, and adjourned the application in the hope that clearer evidence could be obtained as to whether the contractual appointment mechanism had indeed broken down.

3. Montpelier filed further evidence which, in general terms, confirmed that its party-appointed arbitrator, despite receipt of my Ruling, was not willing to agree with MPCL's party-appointed arbitrator that the lot-drawing mechanism should be utilized. The March 24, 2008 letter under cover of which the Third Affidavit of Elizabeth Jane Andrewartha was filed requested that the Court proceed forthwith to make the requested appointment. Out of an abundance of caution, having regard to the fact that Article 11(5) of the Model Law provides that any such appointment would not be subject to an appeal, I invited further submissions on the question of whether or not this Court was competent to do more than simply make the relevant appointment as Montpelier contended.

4. Having further considered the original written submissions and authorities together with the supplementary material, in light of the history of delay that has been occasioned as a result of the breakdown of the contractually agreed appointment mechanism, it was on balance reasonably clear that the only power conferred on this Court by Article 11 (4) of the Model Law, where two arbitrators are unable (for any reason) to agree on the implementation of a contractual

appointment procedure, is to make the appointment itself. The appointment obviously had to be made having regard to the parties' submissions as to qualified and non-conflicted potential candidates, but need not follow the contractually agreed procedure which has broken down[1].

5. Although it seemed clear that MPCL was legally correct that the lot-drawing mechanism was intended to be a mandatory last-ditch mechanism which would come into play where all other consensual options had been exhausted, I was bound to reject MPCL's request that I give a further Ruling to this effect in the hope that the deadlock might still be broken. Such a course would only be appropriate if I was satisfied that Article 11(4) empowered the Court to effectively compel the two party-appointed arbitrators to comply with the Court's construction of the agreement. Article 11(4), in my judgment, does not have this effect. I now consider that I ought not to have even attempted to resolve the deadlock by requesting that this Court's Ruling be communicated to the arbitrators. Instead, the application ought to have been granted on March 11, 2008, applying a low threshold of proof as regards the existence of a deadlock sufficient to justify the Court's intervention by way of making the requisite appointment.

6. Accordingly, this Court decides to appoint Mr. Michael Collins QC as the third arbitrator. He was the most acceptable to MPCL of the candidates nominated by Montpelier and is, in my judgment, a suitably qualified choice in all the circumstances of the present case, having regard to the fact that the relevant contracts are substantively governed by Bermuda law. I make this Order despite the fact that Montpelier has pursued a litigation strategy designed to avoid the mandatory lot-drawing process which the parties bargained for because it feared that the arbitrators nominated by MPCL's arbitrator, though technically qualified, might not apply Bermudian substantive and procedural law. However, Montpelier's experienced party-appointed arbitrator himself raised concerns about the suitability of the candidates proposed by his counterpart, and it is arguable that these concerns are relevant to whether or not the spirit (if not the letter) of the otherwise mandatory mechanical agreed appointment procedure is being adhered to in practical terms.

7. I am bound to reject the contention that Montpelier's conduct is either an abuse of the process of the Court or involves a clear violation of the terms of the arbitration agreement by which both parties are bound. Article 11(4) of the Model Law requires the Court to help constitute an arbitration panel wherever it is clear that the agreed appointment procedures have broken down. The Court's primary statutory duty is to ensure that the parties can resolve their dispute before an independent and impartial arbitral tribunal without delay. This overriding policy consideration trumps deference to the particular contractual procedure which appears to have broken down. Because, in a clause governed by Bermuda law, the contractual appointment procedures can only validly operate as administrative

[1] A single judge could not in any event conduct the contractually agreed appointment procedure.

tools to be utilized for the ultimate goal of constituting an independent and impartial panel. And dismissing the application would potentially leave the Montpelier, who apparently seeks payment through the arbitration proceedings, with no convenient remedy for seeking to constitute the arbitral panel.

8. Because Montpelier acted unreasonably in making what it appears to have regarded as an irrevocable commitment to the position that this Court should make the third arbitrator's appointment, forsaking any reasonable efforts to avoid the need for the initial hearing on March 11, 2008 and the resumed hearing on April 16, 2008, I make no order as to costs. The relevant unreasonable conduct was not as I initially considered in all the circumstances sufficiently serious to warrant granting MPCL the costs of an application which it has lost.

9. The present application was fully argued on the basis that the present application was the first time a Bermudian Court was considering an application under Article 11(4) and that no relevant persuasive judicial authority could be found. While I am satisfied that no conveniently accessible judicial authorities directly on point can be found, I do make passing reference below to some indirect judicial authority. I saw no need to invite further submissions as these authorities merely confirmed the text authorities cited by counsel on the approach to the Model Law generally and as regards the specific provisions which fell for consideration in particular.

The arbitration agreements

10. The parties have referred certain disputes to arbitration, which arise under two Interest and Liabilities Contracts (reference numbers A5AISI001/ A5AISI002) under which Montpelier (a Bermuda insurer) is reinsured by the MPCL (a Barbadian insurer) ("the Policies"). The disputes in each case relate to coverage year 2005 and arise under two identical arbitration clauses which provide as follows:

> "*<u>ARTICLE 27</u>*
>
> *<u>ARBITRATION</u>*
>
> *A .Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or invalidity thereof shall be finally and fully determined by arbitration seated in Bermuda, by a Board composed of three arbitrators to be selected for each controversy as follows:*
>
> *B. Any party may, in the event of such a dispute, controversy or claim, notify the other party or parties to such dispute, controversy or claim of its desire to arbitrate the matter, and at the time of such notification the party desiring arbitration shall*

notify any other party or parties of the name of the arbitrator selected by it.

The other party who has been so notified shall within thirty (30) calendar days thereafter select an arbitrator and notify the party desiring arbitration of the name of such second arbitrator. If the party notified of a desire for arbitration shall fail or refuse to nominate the second arbitrator within thirty (30) calendar days following the receipt of such notification, the party who first served notice of a desire to arbitrate may appoint a second arbitrator and in such a case the arbitrator so appointed shall be deemed to have been nominated by the party or parties who failed to select the second arbitrator. **The two arbitrators, chosen as above provided, shall within thirty (30) calendar days after the appointment of the second arbitrator choose a third arbitrator. In the event of the failure of the first two arbitrators to agree on a third arbitrator within thirty (30) calendar days thereafter, the arbitrators may, upon mutual agreement, implement the ARIAS-U.S. Umpire Appointment Procedure to select the third arbitrator. Alternatively, each arbitrator will nominate three candidates and notify the other arbitrator of those nominations. The arbitrator receiving such notice will reject two of the candidates so nominated. The third arbitrator will then be chosen from the remaining two candidates by a lot drawing procedure acceptable to the two arbitrators, and the chosen candidate will be appointed.** *Upon acceptance of the appointment by said third arbitrator, the Board of Arbitration for the controversy in question shall be deemed fixed. All claims, demands, denials of claims and notices pursuant to this Agreement shall be given in accordance with this section.*

C. The Board of Arbitration shall fix, by a notice in writing to the parties involved, a reasonable time and place for the hearing and may prescribe reasonable rules and regulations governing the course and conduct of the arbitration proceeding, including, with limitation, discovery by the parties.

D. The Board shall, within ninety (90) calendar days following the conclusion of the hearing, render its decision on the matter or matters in controversy in writing and shall cause a copy thereof to be served on all the parties thereto. In case the Board fails to reach a unanimous decision, the decision of the majority of the members of the Board shall be deemed to be the decision of the Board and the same shall be final and binding on the parties thereto. Such decision shall be a complete defense to any attempted appeal or litigation of such decision in the absence of fraud or *collusion. Without limiting the foregoing, the parties waive any right to appeal to, and/or seek collateral review of the decision of the Board of Arbitration by, any court or other body to the fullest extent permitted by applicable law.*

E. Any order as to the costs of the arbitration shall be in the sole discretion of the Board of Arbitration, who may direct to whom and by whom and in what manner they shall be paid.

F. ***All arbitrators shall be present or former executive officers of insurance or reinsurance companies or Underwriters at Lloyds', London, or lawyers or other professional advisors with not less than ten (10) Annual Periods experience in the insurance and reinsurance business and shall be impartial third parties, without past employment or directorial relations with the parties to the Arbitration.*** *All prospective arbitrators shall disclose within thirty (30) days of his or her appointment any relationships with the parties to the arbitration.*

G. If disclosure of employment of directorial relationships is made by any prospective arbitrator, either party has the right to remove such prospective arbitrator. Another arbitrator shall thereupon be selected by the party whose arbitrator was disqualified, or in the event that the prospective presiding arbitrator is disqualified, by the remaining arbitrators."

[emphasis added]

11. The controversial provisions of the clause concern the procedure for the appointment of a third arbitrator once the parties have appointed their own arbitrators. Clause 27 provides for two explicitly consensual modes of appointment: (a) the third arbitrator "*shall*" be appointed by the two party-appointed arbitrators within 30 days of their own appointment; and (b) "[i]*n the event of the failure of the first two arbitrators to agree on a third arbitrator within thirty (30) calendar days thereafter, the arbitrators* may *upon mutual agreement, implement the ARIAS-US Umpire Appointment Procedure*". The third option is defined as follows: "*Alternatively, each arbitrator* **will** *nominate three candidates and notify the other arbitrator of those nominations. The arbitrator receiving such notice* **will** *reject two of the candidates so nominated. The third arbitrator* **will** *then be chosen from the remaining two candidates by a lot drawing procedure acceptable to the two arbitrators, and the chosen candidate* **will** *be appointed.*" [emphasis added]

12. It is unarguably clear, as Mr. Riihiluoma submitted, that the third option is intended to be a mandatory final option where the two party-appointed arbitrators have been unable to effect the third appointment on a consensual basis. While it

obviously implies that the three candidates on each side must meet the minimum qualifications for appointment prescribed by paragraph F of clause 27, it cannot sensibly be suggested that such a random selection procedure was intended to be more than a simple mechanical process. It is true that the details of the process had to be mutually agreeable (for instance, which of the two should hold the lots or which- if either of them- should draw the lots), but the principle of deciding by lots was manifestly not subject to mutual agreement. Mr. Woloniecki appeared to invite the Court to conclude that it was obvious that the experience of the third arbitrator, beyond basic qualifications, was highly relevant, without linking this contention to the words of the clause. Montpelier's evidence contended that seeking to appoint a third arbitrator with Bermuda law experience was consistent with the spirit of the clause. This issue was important to the Court's assessment of MPCL's argument that either the Court should seek to enforce the contractual appointment machinery or decline to grant Montpelier relief on the grounds that its support of Mr. Kellett's position represented procuring a breach of contract.

13. Without deciding this issue, which does not fall to be positively determined, it does seem to me to be arguable that clause 27F or similar clauses defining a wide range of qualifications imports into the arbitration agreement by implication of a duty to consider the suitability of the third arbitrator for the particular arbitral dispute over and above the basic qualifications. Depending on the nature of the dispute and the applicable governing law, the third arbitrator might be expected to have either particular market experience or particular legal experience. It is not obviously absurd to suggest that, even in relation to a mandatory last-option lot-drawing process, the two party-appointed arbitrators would be impliedly required to reach some agreement on the particular background their respective candidates should possess.

14. The contractual bargain clearly was for the third arbitrator to be appointed either (a) by mutual agreement of the two party-appointed arbitrators, (b) by mutual agreement, through an independent appointment mechanism (ARIAS-US), or (c) in the absence of agreement, by a random lot-drawing process. It is in my experience common to find two appointment options, one based on mutual agreement and the second a mandatory appointment by a third party appointing authority by way of default. I have never come across a commercial arbitration clause where, save by accidental omission, no mandatory fall-back option is provided in the event that a consensual appointment is not made. The default position is one of the most obvious scenarios which professional drafters of arbitration clauses consider. The liabilities insured under the Policies were $25 million in excess of $175 million and $30 million in excess of $30 million (First Andrewartha Affidavit, paragraph 26). It is impossible to conclude, having regard to the terms of the clause and the commercial context in which it appears, that such a random procedure as a lot-drawing mechanism would have been intended to be utilised other than as a mandatory final option. This very point was made by Choate Hall & Stewart on behalf of MPCL in correspondence on December 12, 2007.

15. Although clause 27 did not prescribe as a formal qualification any requirement that the third arbitrator should have any familiarity with Bermuda law or Bermuda arbitrations, the desirability of such experience in relation to a dispute which potentially raises important Bermuda law issues cannot seriously be doubted. This arises from the admitted fact that, on their face, the Policies are substantively governed by Bermudian law[2], and the apparently uncontested fact that the procedural law of an arbitration taking place in Bermuda (in the absence of a contrary contractual provision) is very likely to be Bermudian law as well: *Starr Excess Liability Insurance Company, Ltd.-v-General Reinsurance Corporation* [2007] Bda LR 34 (per Bell J at paragraph 19). Mr. Kellett's concerns about the background of the eventual third arbitrator cannot be characterised as frivolous, and clearly have some rational basis.

The break-down of the contractually agreed appointment procedure

16. In summary, the factual history of the appointment process is as follows:

(a) on October 17, 2007, MPCL appointed Charles M. Foss as its arbitrator;
(b) on October 30, 2007, the Montpelier appointed Bryan Kellett as its arbitrator;
(c) on or about November 29, 2007, the time for agreement on the appointment of a third arbitrator expired;
(d) on or about December 6, 2007, a seven day extension requested by the two arbitrators expired without any appointment being made;
(e) on December 10, 2007, MPCL's US attorneys (Choate Hall & Stewart) emailed Montpelier's London solicitors in material part as follows:"…I understand that our respective arbitrators have reached a stalemate with regard to umpire selection, and they have requested our assistance in that regard…";
(f) on December 12, 2007, MPCL's attorneys wrote to Montpelier's solicitors confirming the earlier email, but additionally stating that in their view the next step was for the two arbitrators to implement the non-consensual "*Cross-Striking Process*", which they believed was clearly the default appointment mechanism in the event of deadlock. They invited their opponents to indicate their interpretation of the contractually agreed default mechanism;
(g) on December 14, 2007, Montpelier's solicitors repeated what they contended had been proposed by them in a December 11, 2007 telephone call, namely, that the matter be referred to this Court. No position was

[2] MPCL's formal position was that it reserved its rights as to what the governing law of the Policies actually was. In the absence of any positive assertions as to why an express choice of Bermuda law as the governing law should be inoperative, I assumed for the purposes of the application that Bermuda law applied.

taken on the interpretation of the clause, it being suggested that this was a matter for the arbitrators, not the parties;

(h) on December 18, 2007, the present application was filed, Directions were ordered on February 6, 2008 and the application was listed for hearing on March 11, 2008 by which date there was still no direct evidence as to the reason why the arbitrators were unable to make the relevant appointment;

(i) on March 11, 2008 I adjourned the application so that further evidence could be obtained as to whether a true deadlock existed. I directed that my Reasons for Adjournment (in which I stated my provisional view that the lot-drawing mechanism was arguably mandatory) could be forwarded to the two party-appointed arbitrators. I deliberately refrained from expressing a stronger provisional view or, indeed, a concluded view, because I doubted whether this court possessed the jurisdiction to formally construe the clause;

(j) on March 13, 2008, Clyde & Co forwarded the March 11, 2008 Ruling to the two arbitrators indicating that Attride-Stirling & Woloniecki had advised in relation to the Bermudian law-governed Policies that (1) the lot drawing procedure was not mandatory, (2) the views of the parties on the interpretation of the clause were irrelevant, and (3) if the lot drawing procedure was not followed, the court could not compel the arbitrators to draw lots. It was also properly pointed out that Appleby had given advice to contrary effect;

(k) Mr. Kellett clarified his position in emails to Ms. Andrewartha of Clyde and Co on March 14, 2008 and to Mr. Attisani of Choate on March 19, 2008. In essence, he was of the view that the third arbitrator should have experience of Bermuda arbitrations (although this was not a contractual requirement) and that the lot-drawing mechanism required his agreement as it was not mandatory.

17. The reasoned explanation for why a deadlock clearly now exists was set out in the following paragraphs of Mr. Kellett's March 19, 2008 email:

> "*I remain of the view that the application of the cross strike method, which is expressed as an alternative to the ARIAS-US Umpire Appointment procedure, requires my agreement. You refer, in your letter to what Mr Justice Kawaley had said, namely that the cross strike is* ***arguably*** *(my emphasis) a mechanical default provision which must be applied, but on my reading of it, he had not ruled that it* ***definitely*** *is so.*
>
> *The parties have chosen to have any dispute determined by arbitration in Bermuda. I have indicated to Mr. Foss that, in these circumstances, I consider it essential that the third arbitrator, who will act as chairman of the Tribunal, should have experience of arbitration in that jurisdiction. As far as I can see, none of the candidates proposed by Mr. Foss satisfies that criteria.*

Regrettably therefore, we remain deadlocked…"

18. Prior to the commencement of the present proceedings on December 18, 2007, the controversy which had brewed more resembled a storm in a teacup than the famous Boston "tea party". The initial application was made to Court before it was clear that a true deadlock existed, in the sense that although an impasse of sorts existed, Montpelier refused to take any reasonable steps to seek to resolve it. There was no apparent reason why Montpelier's lawyers could not at least have attempted to agree on a joint submission to the arbitrators asserting that (a) the lot-drawing mechanism was ultimately mandatory, but also (b) the candidates on both sides should all have some Bermuda arbitration experience. Parties to arbitration agreements must surely seek to make the contractual appointment provisions work before applying to Court for relief on the grounds that the contractual selection process has broken down. And MPCL's lawyers surfaced the deadlock issue by indicating that it appeared that the two arbitrators required the parties' assistance.

19. Whether this conduct constitutes an abuse of process or other similar misconduct which justifies this Court in either refusing Montpelier relief to which it would otherwise be entitled or imposing penalties by way of costs will be considered below. But first, the jurisdiction of the Court must be considered.

Jurisdiction of Court to appoint arbitrators in default under Article 11 (4)(d) of the UNCITRAL Model Law on International Commercial Arbitration 1985

<u>Approach to the Model Law</u>

20. The UNCITRAL Model Law was incorporated into Bermuda law through the Bermuda International Conciliation and Arbitration Act 1993 on June 29, 1993, almost 15 years ago. Interpreting the Model Law still presents new challenges, partly because a variety of issues have yet to be determined by this Court or the courts in any jurisdiction where the Model Law applies. There is only really one prominent practitioner's text on the Model Law, Holtzmann and Neuhaus, '*A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*'[3]. The commentary in this text is authoritative because it is based on the *travaux preparatoires* of the Conference which adopted the Model Law, in which Conference the lead author participated on behalf of the United States[4]. Section 24 of the 1993 Act expressly permits reference to be made to the *travaux preparatoires*:

[3] (Kluwer: Deventer/Boston/The Hague, 1989).
[4] Extracts of the Conference drafting records are also reproduced in the text.

> "24 *For the purposes of interpreting the Model Law, reference may be made to the documents of—*
>
> *(a) the United Nations Commission on International Trade Law, including but not limited to, documents of its Secretariat submitted to the Commission and the Summary Records of sessions of the Commission; and*
>
> *(b) the Commission's working group for the preparation of the Model Law relating to the Model Law.*"

21. The Model Law must therefore be construed in a distinctive way from the approach that would be adopted when construing ordinary domestic legislation. It is essentially international legislation, the language of which largely reflects the compromises and negotiations conducted by expert representatives from a wide array of national legal systems. Not only is the Model Law international in character, giving rise to the need for a distinctive interpretative approach, article 5 of the Model Law provides that supervising courts only have such powers as are conferred by the Model Law itself, depriving this Court of the popular common law resource of general jurisdiction. Common law courts in jurisdictions which, like Bermuda, have adopted the Model Law in undiluted form may well, in the early years at least, gain some appreciation of the judicial approach which is followed in jurisdictions governed by a Civil Code. The difficulties which would arise for common law courts in being constrained to act only in cases provided for by the Model Law were noted by United Kingdom representatives at various stages of the Model Law drafting process.

22. Although no cases appear to exist which are directly on point for present purposes, there are roughly 50 UNCITRAL Model Law countries and approximately 60 Model Law jurisdictions. The common law jurisdictions include Australia, Canada, Hong Kong, India, Ireland, Nigeria, Singapore and six American states (California, Connecticut, Illinois, Louisiana, Oregon and Texas), so persuasive case law on the Model Law should increasingly become available. But even such case law will have to be treated with care since different jurisdictions may have implemented the Model Law with local variations which impact on the persuasive weight to be attached to judicial decisions on the relevant Model Law regime. The development of such international jurisprudence will not diminish the distinctive character of the UNCITRAL Model Law as an international legal code which will always require a different interpretative approach to that adopted with respect to ordinary domestic legislation.

<u>Article 5: limited ability of Court to intervene in arbitral process and impact on application under Article 11(4)</u>

23. Article 5 provides as follows:

> "*Article 5. Extent of court intervention*

In matters governed by this Law, no court shall intervene except where so provided in this Law."

24. According to Holtzmann and Neuhaus (at page 216):

> "*Article 5 states a simple, but very important principle. Its purpose is to oblige the draftsman of the Law* [i.e. the domestic legislation implementing the Model Law, in Bermuda's case the 1993 Act] *to state any instances in which court control is envisioned, in order to increase certainty for parties and arbitrators and further the cause of uniformity. As noted by the Secretariat the effect of the provision is to 'exclude any general or residuary powers' given to a court of the enacting State in statutes other than the model Law. The Commission made clear that the term 'intervene' in Article 5 included court action that might be categorized as 'assistance' to the arbitration rather than intervention in it. Article 5 should not be taken to express hostility to court intervention or assistance in appropriate circumstances, but only to satisfy the need for certainty as to when court action is permissible.*"

25. Mr. Woloniecki for Montpelier placed considerable reliance on this passage in support of his key submission as to how the Court's jurisdiction under Article 11 (4)(b) of the Model Law should be construed. Mr. Riihiluoma skilfully sought to minimize the force of this key submission by reminding the Court that the dominant principle underlying Article 5 and the Model Law as a whole was party autonomy; and this mitigated in favour of giving considerable deference to the parties' contractually elected appointment mechanism. In addition, he challenged Montpelier's confident assertion that the Court was clearly empowered to appoint the third arbitrator under Article 11(4)(b). It is to this central provision that attention must now be given.

<u>Jurisdiction under Article 11(4) of the Model Law to appoint an arbitrator when contractual procedure has broken down</u>

26. Article 11 makes provision for this Court to intervene in arbitral proceedings in the following terms:

> "*Article 11. Appointment of arbitrators*
>
> *(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*
> *(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.*
> *(3) Failing such agreement,*

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, *or*

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. *The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.*" [emphasis added]

27. Montpelier submitted from the outset that Article 11(4)(b) was engaged on the facts. It followed that the Court could do no more than to make the appointment, and no jurisdiction to give a binding declaratory ruling as to the parties' rights under the clause, nor indeed to compel the arbitrators to comply with the Court's construction of the arbitration agreement, could be found within the clause. At the initial hearing, MPCL contested this analysis and requested the Court to compel

the Applicant's arbitrator to comply with the mandatory requirements of the clause. MPCL submitted at the resumed hearing that the Court could properly rule on the meaning of the clause, particularly since it appeared likely that Mr. Kellett might change his position if the court gave a definitive ruling that the lot-drawing mechanism was indeed mandatory. Mr. Woloniecki relied upon paragraph 32 of the Fifth Working Group Report[5], which clearly supported his submission that this Court has no supplementary powers at all:

> "*As regards the function entrusted to the Court by paragraph (4) of that article, the Working Group was agreed that the words 'to take the necessary measure' meant that the Court had to take the necessary measure itself (that is, to make the appointment) and not, for example, order an appointing authority, which failed to do so, to perform the function entrusted to that authority by the parties.*"

28. A Secretariat Note also indicates that the role of court action under Article 11(4) is to "*avoid any deadlock or undue delay in the appointment process*"[6]. The scheme of the Model Law as a whole, which emphasises the autonomy of the arbitral process and limits court intervention to a minimum, is entirely consistent with the conclusion that this Court under Article 11(4) is not entitled to directly or indirectly compel the contractually agreed appointing authorities (be it the parties themselves or two arbitrators) to make the appointment when they have failed to do so.

29. The only Model Law provisions permitting intervention by the Court specified pursuant to Article 6 are Articles 11(3), (4) (appointment of arbitrators), 13(3) (challenge of arbitrators), 14 (termination of arbitrators' appointment due to failure to act), 16 (3) (ruling on jurisdiction), 34(2) (application to set aside award on grounds similar to those for refusing to enforce a foreign award). The designated court in each case is specified by the 1993 Act as follows:

> ***"Court specified for purposes of Article 6 of Model Law***
>
> *25 The courts that are competent to perform the functions referred to in Article 6 of the Model Law are as follows:*
>
> > *(a) for the purposes of Articles 11(3), 11(4), 13(3), 14 and 16(3) of the Model Law, the Supreme Court and there is no right of appeal from a decision of that court;*
> >
> > *(b) for the purposes of Article 34(2) of the Model Law, the Court of Appeal and there is no right of appeal from a decision of that court."*

[5] A/CN.9/246, March 6, 1984, set out in Holtzmann and Neuhaus at page 378.
[6] Holtzmann and Neuhaus, page 382. The importance of this construction to avoiding delay is also made by the learned authors at page 362 note 17.

30.The fact that no appeal lies from this Court's decisions in relation to the appointment of arbitrators under Articles 11, 13 and 14 (as well as this Court's and the Court of Appeal's rulings on jurisdiction and applications to set aside an award) further supports the view that Court intervention is intended to delay to the minimum extent possible the progress of the arbitration regime which the parties have agreed upon to determine the relevant international commercial dispute. Accordingly, MPCL's invitation that the Court should definitively rule on the mandatory nature of the lot-drawing appointment mechanism and further adjourn in the hope that this might break the deadlock must be rejected on the grounds that this course would fall outside of the jurisdictional scope of Article 11(4)(b) of the Model Law. While the Court did perhaps possess the jurisdiction to adjourn on March 11, 2008 to permit Montpelier to adduce further evidence, the need for further evidence, in hindsight, did not properly arise. Further, it now seems clear that it was legally improper for me to have requested that this Court's Ruling to be communicated to the two arbitrators with a view to the Court itself facilitating a breaking of the deadlock. The two experienced party-appointed arbitrators had communicated a disagreement in early December, 2007, and by March 11, 2007, over three months later, the third arbitrator had still not been appointed. The entire rationale behind the Court's powers under Article 11(4) being limited to making the appointment is "*to avoid further delay in the arbitral proceedings*"[7].

31. This approach is in stark contrast with the pre-UNCITRAL era in which the House of Lords held that on an application under section 5 of the Arbitration Act 1899 for the Court to appoint an umpire by way of default when two arbitrators failed to make the contractual appointment, the Court had power to summon the arbitrators to give evidence as to why they had failed to make the appointment: *Taylor –v- Denny, Mott and Dickson* [1912] AC 666. Under a framework in which the Court's supervisory role over arbitrations was far more extensive, the approach towards court intervention was far more fluid. In Bermuda's domestic arbitration law context under the Arbitration Act 1986, a request that the Court seek to compel the arbitrators to make the requisite appointment might well be jurisdictionally sound.

32. The mere fact that the panel was still not properly constituted ought to have been enough to engage the jurisdiction to make the appointment, even though it appeared at the time that the delay might have been attributable in part to the fact of the application to this Court. The fact that an application may be made under Article 11(4) without regard to the need to prove a failure to agree of any specific period of time has been justified by the *travaux preparatoires* in the following terms: "*since the persons expected to agree are the parties…their inability to do so becomes apparent from the request to the Court by one of them.*"[8] Although this commentary refers explicitly to a disagreement between the parties, it applies in the present case with equal force to a disagreement between two party-appointed arbitrators as well. In the present case MPCL, while opposing the appointment application, sought the

[7] Holtzmann and Neuhaus, page 362 note 17.
[8] Seventh Secretariat Note A/CN.9/264, Holtzmann and Neuhaus page 382.

Court's intervention to enforce the contractual mechanism, that very request constituting clear evidence that the contractual mechanism had broken down.

33. This narrow definition of the Court's jurisdiction to intervene is in an indirect way supported by persuasive judicial authority. In *Mitsui Engineering and Shipbuilding Co. Ltd. –v- Easton Graham Rush* [2004] SGHC 26; [2004] SLR 14, the Singapore High Court held that it did not possess the power to grant an injunction to restrain an arbitrator from acting pending an application for his removal. This decision was based on an analysis of the terms and effect of Article 5 of the Model Law and the commentary thereon in *Holtzmann and Neuhaus* to which counsel in the present case referred. The Hong Kong Court of Appeal, considering an application under Article 11(3) of the Model Law, expressed the view that it was inappropriate for a court to express more than provisional views on matters which it fell to the arbitrators to decide. In *Private Company 'Triple v Inc' v Star (Universal) Co Ltd & Anor* [2005] 3 HKC 129, Litton VP observed:

> *"If the judge were to go into the matter more deeply, he would in effect be usurping the function of the arbitrator. Whilst, clearly, the judge had to make a judgment as to whether there existed an underlying agreement to arbitrate, he could do no more than to form a prima facie view. Here, in exercising his jurisdiction under art 11(3), Leonard J in effect asked himself whether it was arguable that Contract No 1034HK still subsisted, despite the existence of the subsequent agreement. This seems to me the correct approach."*[9]

34. In the present case there was of course no dispute at all as to the existence of the arbitration agreement, but it was equally a matter in the first instance for the arbitral panel to decide on all questions concerning the interpretation of the agreement as a whole. It was entirely a matter for the two party-appointed arbitrators to decide how to interpret the provisions of clause 27B of the Policies with respect to the appointment of a third arbitrator, and this Court is not required to formally determine (in the context of the present application) whether any one or other interpretation is right or wrong.

35. It remains to consider MPCL's technical construction submission on the scope of Article 11(4)(b) itself. Mr. Riihiluoma rightly contended that Article 11(4) gives primacy to the parties' contractually agreed mechanism, and expressly provides that the Court's default appointing power cannot be engaged where the clause itself provides another mechanism. More controversially, however, he submitted that because the lot-drawing mechanism required no agreement on any matter of substance, the Montpelier had failed to establish any qualifying absence of agreement. Article 11(4), he reminded the Court, provides as follows:

> *"(4) Where, under an appointment procedure agreed upon by the parties,*

[9] Transcript, page 3.

> *(a) a party fails to act as required under such procedure, or*
>
> **(b)** *the parties, or two arbitrators,* **are unable to reach an agreement expected of them under such procedure,** *or*
>
> *(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,*
>
> *any party may request the court or other authority specified in article 6 to take the necessary measure,* **unless the agreement on the appointment procedure provides other means for securing the appointment."** [emphasis added]

36. The argument that the present facts do not qualify for relief under Article 11(4)(b) must, after careful analysis, be firmly rejected. Firstly, it is not accurate to state that no agreement is contemplated at all under the lot-drawing provisions of clause 27 of the Policies. The relevant provision itself states: "*The third arbitrator will then be chosen from the remaining two candidates by a lot drawing procedure acceptable to the two arbitrators…*" But this point is not dispositive because the real cause of the deadlock is not a failure to agree on the procedure, but a failure to agree on whether, as a matter of construction, the procedure is a mandatory or permissive one in circumstances where there is a dispute as to the suitability of the candidates tendered for the purposes of the mechanical selection process. MPCL has always correctly contended that the two party-appointed arbitrators need not agree on the third appointment procedure if they fail to make the appointment using either of the first two consensual options. It is necessary to have regard to what the true nature of the dispute appears to be on the facts.

37. If one strips away the covering layers of partisan analysis, the bare facts are simply as follows. Mr. Kellett contends that the arbitration agreement requires the two party-appointed arbitrators to nominate candidates who have Bermuda arbitration experience. Accordingly, he refuses to engage the lot-drawing procedure in circumstances where Mr. Foss has proposed candidates who do not possess what he considers to be the relevant experience and one of whom will have a 50% chance of being selected as the third arbitrator. Mr. Foss contends that the arbitration agreement merely requires the two party-appointed arbitrators to draw lots with each one able to propose any qualified candidate, there being no express or implied requirement for consensus on particular experience relevant to the particular disputes. Even if Mr. Kellett's view of how the appointment procedure is intended to work is wrong, it would be highly artificial to conclude that Article 11(4)(b) is not engaged because the clause does not explicitly provide that the two arbitrators must agree on how the relevant procedure should be applied.

38. In my judgment, Article 11(4)(b) ought to be given more of a broad and purposive construction than a narrow and technical one. The clear purpose of the provision is to empower the Court to appoint an arbitrator where either the parties or two party-appointed arbitrators have been unable to effect the relevant appointment in accordance with the agreed procedure. The nature of the inability to "reach an agreement" is in my view either irrelevant or subsidiary to the dominant practical concern that the appointment mechanism provided for by the contract has clearly broken down. Here the arbitrators have clearly failed to agree that either (a) the suitability of candidates who meet the minimum contractual requirements is irrelevant, or (b) only qualified candidates who have Bermuda arbitration experience should be included in the lot-drawing process.

39. The further argument that the lot-drawing mechanism provided for itself constitutes "*an alternative means for securing the appointment*" must also be rejected on the facts of the present case. It is wholly circular to argue that the Court cannot make an appointment which the arbitrators are unable to make using the contractual procedure on the grounds that the parties have contractually prescribed the very procedure which has been shown to have broken down. That jurisdictional impediment to this Court granting relief under Article 11(4) would only arise in circumstances where no sufficient opportunity had been afforded to the appointing entity to make an appointment at all. These conclusions are in no way inconsistent with the following commentary on Article 11(4) (which emphasises that the parties have unrestricted freedom with regard to contractual appointment procedures) upon which Mr. Riihiluoma relied:

> " ***Appointment pursuant to an agreement of the parties.*** *Paragraph 2 of Article 11 does not state any limitations on the parties' freedom to agree on a procedure for appointing the arbitrator or arbitrators. The provision does state that the freedom is "subject to the provisions of paragraphs (4) and (5) of this article," but those paragraphs only provide for supplementary intervention by the courts in case the agreed-on procedure fails to work; they do not place any express limitations on the parties. Nevertheless, in drafting paragraph 2 it was recognized that the Model Law as a whole implied certain restrictions on the parties' agreement regarding appointment of arbitrators. The Third Working Group Report cited as examples two articles that give rise to such restrictions: Article 12, concerning the grounds for challenging arbitrators, and Article 34, concerning the courts' power to set aside arbitral awards. Thus, for example, if the procedure agreed on results in an arbitral tribunal that fails to meet the standards of impartiality and independence established by Article 12, the arbitrator would be subject to challenge. Similarly, if an appointment procedure results in a party not receiving "proper notice of the appointment of an arbitrator," an award may be set aside and refused recognition or enforcement under Articles 34(2)(a)(ii) and 36(1)(a)(ii). These are specific restrictions contained in the Model Law that go to the effects of the appointment procedure. These restrictions regulate the results of the selected appointment procedure, not*

> *the procedure itself. Thus, if the arbitration agreement does not provide for "proper notice of the appointment of an arbitrator," the claimant presumably can protect an eventual award from attack on this ground by giving such notice.*
>
> *The Working Group considered at some length adding to Article 11 an explicit limitation on the parties' freedom to determine the procedures for selection of arbitrators. The provision would have stated that a procedure agreed upon by the parties would be invalid if, or to the extent that, it gave one party a "predominant position," or in the words of an alternative draft, a "manifestly unfair advantage," with regard to the appointment of arbitrators. This provision was later deleted because (1) the problem did not arise frequently; (2) other provisions of the Law, such as Articles 12 and 34, could be used to address the problem; and (3) the wording was regarded as "too vague" and thus could lead to controversy, dilatory tactics, and, potentially, invalidation of "well-established and recognized appointment practices." While the Working Group concluded that such a provision had no place in the Model Law, and the final text adopted by the Commission confirms that decision, the Working Group did note that its determination should not be understood as expressing support for unfair practices.*"[10]

40. Because the above conclusions do illustrate that a liberal approach to exercising jurisdiction under Article 11 could encourage parties and their appointed arbitrators to simply ignore contractual procedures altogether, some observations on potential abuse of Article 11(4) must be made.

Avoiding abuse of Article 11(4) and usurpation of contractually agreed appointment procedures

41. As I indicated in the course of the hearing, it is important to avoid a distorted interpretation of provisions of the Model Law grounded in a desire to meet the justice of the peculiar facts of the case before the Court. From a traditional common law perspective, it causes discomfiture to consider that the appointment procedure may have been aborted due to a misconceived interpretation of the arbitration clause by one party or their party-appointed arbitrator. This is particularly the case where the clause in question is governed by Bermudian law, and the party allegedly in breach somewhat smugly submits that this Court is powerless to correct any error which may have occurred. But this is how the Model Law is intended to operate, and other safeguards for the interests of the sanctity of the parties' contractual bargain do exist.

42. Firstly, it may be helpful to consider what remedies do exist if an arbitrator does create a deadlock on improper grounds. Firstly, an application may be made to this Court to challenge the arbitrator under Article 13 or terminate his appointment under Article 14. So, for instance, where both parties agreed that a

[10] Holtzmann and Neuhaus, pages 359-361.

lot-drawing mechanism was mandatory and one or both arbitrators refused without just cause to make an appointment, the recalcitrant arbitrator's own appointment could be brought to an end. Here, I hasten to add, Mr. Kellett has refused to follow the contractual procedure (a) because of apparently genuine concerns about the suitability of his counterpart's candidates, and (b) in circumstances where one party has contended that he is justified in raising such concerns. Mr. Foss' position that his candidates are indeed suitable (or, rather, that no need to consider their suitability properly arises) is warmly endorsed by the party which appointed him as well.

43. Secondly, and more fundamentally, Article 34(2)(a)(iv) provides that an award may be set aside in the following circumstances:

> "*the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law…*"

44. This is perhaps the most powerful sanction for either party seeking to deviate in any material way from the contractually agreed arbitration procedure in general terms. But it admittedly has less significance in terms of the narrow issue of preventing abuse by one party of Article 11(4) applications based on deadlock situations which it has helped to create. The ultimate sanction, perhaps, for inappropriate Article 11(4) applications is this Court's inherent jurisdiction to prevent its processes from being abused, which in my judgment cannot be considered as being ousted by the Model Law. The Model Law restricts what the Court may do in terms of positive intervention with arbitration proceedings. But there is no suggestion that the Court's ability to regulate its processes, whether by rules of court or the Court's inherent jurisdiction to restrain abuses of process, is restricted in any corresponding manner. Such matters are not regulated by the Model Law at all, and Article 5 only requires express provision for court intervention in relation to "*matters governed by this Law*". The Court of Appeal for Bermuda has logically assumed that the rule-making powers applicable to civil proceedings generally apply to proceedings under the 1993 Act: *New Skies Satellite BV-v-FG Hemisphere Associates LLC* [2005] Bda LR 59.

45. Where it was clear that a party acting in bad faith had caused the contractually agreed appointment mechanism to break down so as to gain some perceived advantage through a Court appointment under Article 11(4), the application could be refused on discretionary grounds. Such cases will surely be rare in large international commercial arbitrations where parties are unlikely to appoint arbitrators willing to endanger their livelihoods by gaining a reputation for creating wholly bogus deadlocks in circumstances where it is obvious that they cannot be said to be acting in good faith.

46. Under Bermuda law, in any event, all that a party is entitled to is an independent and impartial arbitrator. Bearing in mind that section 6(8) of the Constitution guarantees the right in civil cases to an independent and impartial tribunal, an arbitration agreement which purported to guarantee either party a right to a partisan tribunal would be of questionable validity. Under the Model Law, itself the results of a contractual procedure which leads to the constitution of a panel which lacks independence and impartiality are subject to challenge. So where the Court appoints an independent and impartial third arbitrator who is contractually qualified for appointment, in default of the contractual appointing procedure, it will be difficult for the respondent to the application to complain that they have suffered substantial prejudice. This will particularly be so when all they have lost is the opportunity to have an independent and impartial third arbitrator selected at random from a list of qualified candidates by the contractually agreed appointing body. The suggestion that MPCL has in any legally cognisable way been prejudiced by being deprived of the opportunity to have the third arbitrator selected by the contractually agreed lot-drawing process is, ultimately, misconceived. This does not mean that parties should be free to actively seek to by-pass the contractual machinery altogether.

47. Article 12(2) of the Model Law provides that an arbitrator "*may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties*". By necessary implication, the Model Law confers on parties to all arbitration agreements to which it applies a right to arbitrators that are (a) independent and impartial (irrespective of what has been explicitly agreed) and (b) qualified for appointment under the arbitration agreement. When the Court makes an appointment under Article 11(3) or (4), Article 11(5) provides in salient part as follows:

> "*The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.*"

48. It is also important to remember that even a third arbitrator appointed by the Court may be challenged under the Model Law on the grounds that they are either unqualified or lack impartiality. Additionally, there is some indirect judicial support for Montpelier's contention that the dominant policy underlying Article 11(4) is the expeditious constitution of the tribunal rather than deference to the contractual appointment mechanism. It is true that the statutory context in which the relevant judicial observations arise is quite different to our own, but this

distinctive legislative approach indirectly supports Montpelier's submission as to the spirit of the Model Law. In India, the power to appoint an arbitrator where a contractually agreed mechanism has broken down has been conferred not on a court with no right of appeal, but on the Chief Justice or his nominee. The Supreme Court of India has opined that the purpose of this legislative approach is to ensure that the appointment may be made as an administrative act with no right to challenge either the application or the decision while judicial review would be available to compel the appointer to make the appointment if he failed to do so. In *Konkan Railway Corp Ltd.-v- Mehun Construction Co* [2001] 3 LRI 952, Patanaik J (giving the judgment of the Court) opined firstly as follows:

> "*With that objective when Uncitral Model* [Law] *has been prepared and the Parliament in our country enacted the Arbitration and Conciliation Act of 1996 adopting Uncitral Model* [Law]*, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. The statement of objects and reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of courts in the arbitral process. If a comparison is made between the language of s 11 of the Act and art 11 of the Model Law it would be apparent that the Act has designated the Chief Justice of a High Court in cases of domestic arbitration and the Chief Justice of India in cases of international commercial arbitration, to be the authority to perform the function of appointment of arbitrator whereas under the model law the said power has been vested with the court. When the matter is placed before the Chief Justice or his nominee under s 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the arbitral tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of ss 13 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the arbitrator, and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same. Section 13(1) provides that party would be free to agree on a procedure for challenging an arbitrator. Sub-section (2) of said section provides that failing any such agreement, a party intending to challenge an arbitrator either on grounds of independence or impartiality or on the grounds of lack of requisite qualifications, shall within 15 days of becoming aware of the constitution of the tribunal send a written statement for the challenge of the tribunal itself. Section 13(3) provides that unless the arbitrator withdraws or the other party agrees to the challenge, the tribunal shall decide on the challenge itself. Sub-section (4) of s 13 mandates an*

arbitrator to continue the arbitral proceedings and to make an award. Section 16 empowers the arbitral tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration agreement. Conferment of such power on the arbitrator under 1996 Act indicates the intention of the legislature and its anxiety to see that the arbitral process is set in motion. This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an arbitrator. If this approach is adhered to, then there would be no grievance of any party and in the arbitral proceeding, it would be open to raise any objection, as provided under the Act. But certain contingencies may arise where the Chief Justice or his nominee refuses to make an appointment of an arbitrator and in such a case a party seeking appointment of arbitrator cannot be said to be without any remedy. Bearing in mind the purpose of legislation, the language used in s 11(6) conferring power on the Chief Justice or his nominee to appoint an arbitrator, the curtailment of the powers of the court in the matter of interference, the expanding jurisdiction of the arbitrator in course of the arbitral proceedings, and above all the main objective, namely, the confidence of the international market for speedy disposal of their disputes, the character and status of an order appointing arbitrator by the Chief Justice or his nominee under s 11(6) has to be decided upon. If it is held that an order under s 11(6) is a judicial or quasi-judicial order then the said order would be amenable for judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a court of law even against an order of appointment of an arbitrator. Such an interpretation has to be avoided in order to achieve the basic objective for which the country has enacted the Act of 1996 adopting Uncitral Model [Law]. *If on the other hand, it is held that the order passed by the Chief Justice under s 11(6) is administrative in nature, then in such an event in a case where the learned Chief Justice or his nominee refuses erroneously to make an appointment then an intervention could be possible by a court in the same way as an intervention is possible against an administrative order of the executive. In other words, it would be a case of non-performance of the duty by the Chief Justice or his nominee, and therefore, a mandamus would lie. If such an interpretation is given with regard to the character of the order that has been passed under s 11(6) then in the event an order of refusal is passed under s 11(6) it could be remedied by issuance of a mandamus. We are persuaded to accept the second alternative inasmuch as in such an event there would not be inordinate delay in setting the arbitral process in motion. But, as has been explained earlier in the earlier part of this judgment, the duty of the Chief Justice or his nominee being to set the arbitral process in* *motion it is expected that invariably the Chief Justice or his nominee would make an appointment of arbitrator so that the arbitral proceeding would start as expeditiously as possible and the dispute itself could be resolved and the objective of the Act can be achieved.*"[11]

49. Obviously Bermuda's Parliament has decided that this Court should make the appointment as part of a judicial proceeding. Nevertheless, the retention without modification of the provision in Article 11(6) that the appointment decision shall not be subject to appeal does reflect a similar concern to avoid excessive delay. Limiting appeal rights is also something more commonly seen under Bermuda law with administrative decisions such as in relation to certain immigration matters. But the local legislative framework read together with its Indian counterpart does suggest a strong policy bias in favour of making an appointment, and against any other form of judicial intervention with the arbitral appointment process. That the Indian legislation based on the Model Law is otherwise the same as our own and is designed at breaking deadlocks is clear from a later passage from the same judgment of the Supreme Court of India:

> "*While sub-ss (4) and (5) deal with removal of obstacles arising in the absence of agreement between the parties on a procedure for appointing the arbitrator or arbitrator, sub-s (6) seeks to remove obstacles arising when there is an agreed appointment procedure. These obstacles are identified in cll (a), (b) and (c) of sub-s (6). Sub-section (6) provides a cure to these problems by permitting the aggrieved party to request the Chief Justice or any person or institution designated by him to take the necessary measure, ie to make the appointment, unless the agreement on the appointment procedure provides other means for securing the appointment. Sub-section (6), therefore, aims at removing any dead-lock or undue delay in the appointment process...*"[12]

50. This persuasive authority supports the view that, save in exceptional cases, where it is clear that no deadlock of any sort truly exists, this Court's primary duty should be to proceed promptly to make the requested appointment. Nevertheless, where it is clear that an applicant for relief under Article 11(4) has made no reasonable attempt to seek to make the contractual procedure work at all, and is in substance seeking to by-pass it, the application may be refused on the grounds that the contractual procedure is still an available remedy, as provided for by Article 11(4) itself.

[11] Transcript, pages 4-5. Cosmetic corrections have been made to the poorly transcribed electronic version of the quoted extracts from this judgment.
[12] Transcript, page 6.

Should Montpelier's application be refused on abuse of process or other discretionary grounds?

51. The available evidence suggests that Montpelier's party-appointed arbitrator initially declined in December 2007 to agree to implement the lot-drawing mechanism which this Court has found to be very arguably mandatory because (a) he had concerns about the suitability of the candidates proposed by his counterpart, one of whom had a 50% chance of being selected if lots were drawn, and (b) he did not believe that the lot-drawing procedure was mandatory. It appears that there was never any suggestion that MPCL's arbitrator had nominated unqualified candidates; Montpelier's arbitrator simply considered that an arbitration taking place in Bermuda in respect of a contract governed by Bermuda law should be chaired by an arbitrator who had some Bermuda arbitration experience.

52. It appears that Mr. Kellett (appointed by the Bermudian incorporated Montpelier) is British and that Mr. Foss (appointed by the Barbadian incorporated MPCL) is American. Mr. Kellett proposed British candidates, seemingly with Bermudian arbitration experience, while Mr. Foss proposed American candidates, who seemingly did not possess such experience. Neither party to the arbitration disputes has any obvious connection with the nationality of the competing candidates, although Montpelier's non-Bermudian attorneys are based in London while their counterparts are based in Boston. It is possible that there is a significant US connection in terms of the underlying risks covered by the Policies, but the slips in each case define the territorial scope of coverage as world wide save for marine risks which are limited to the Gulf of Mexico. However, the at this stage un-contradicted evidence of Ms. Andrewartha is that the disputes involve consideration of whether MPCL are entitled as a matter of Bermuda law to rescind the contracts.

53. What amounted in my judgment to little more than a potential impasse was communicated to the parties' respective legal advisers in or about the second week of December 2007. MPCL's US attorneys suggested that, correctly in my judgment, it was obvious that the lot-drawing procedure was mandatory and was not open to negotiation between the two party-appointed arbitrators once they had failed to agree on the other two consensual appointment procedures. The US attorneys suggested that it appears that the arbitrators required the parties' assistance and proposed a joint submission to the arbitrators to the effect that it was obvious that the lot-drawing procedure was intended to be a mechanical mandatory process, which the arbitrators should proceed to use to appoint the third arbitrator. Montpelier's solicitors, apparently dodging the inconvenient truth of what clause 27B of the Policies obviously meant, responded that there was clearly a deadlock and the best solution was to have this resolved by this Court. They implicitly insisted that their arbitrator was entitled to raise the concerns that he had surfaced about Mr. Foss' candidates, yet made no attempt to invite their

opponents to consider any compromise. They offered no alternative interpretation of how the clause ought properly to be read. A counter-offer of some sort ought reasonably to have been made rather than rejecting the sensible invitation to resolve the impasse out of hand.

54. Having regard to the principles of party autonomy which underlie the Model Law as a whole, combined with the fact that the Montpelier did not challenge the validity of the arbitration agreement and had no basis for suggesting that an attempt was being made to appoint wholly unqualified arbitrators, in an ideal world Montpelier's solicitors ought to have agreed with their US counterpart's proposal. It seems probable, that if both sets of lawyers had agreed that the lot-drawing mechanism was mandatory and requested both arbitrators to engage it, the appointment would fairly promptly have been made. Was it improper in real world terms for Montpelier's legal advisers to refuse to agree with their opponents on a construction of the arbitration clause which was obvious because they considered it was inconsistent with their client's interest so to do? And, more pertinently still, was it improper for them to insist that the experienced arbitrator they had appointed was entitled to raise concerns not so much as to whether lots had to be drawn, but whether his counterpart Mr. Foss was entitled to submit candidates that he Mr. Kellett considered unsuitable?

55. It seems to me that these questions require the Court to descend from the judicial ivory tower, and have some regard to the perspective of the respective combatants in the trenches of litigious warfare where modern case management pleas for cooperation and common sense are often stifled by more deep-seated adversarial instincts. It is also necessary to analyse how the arbitral process was supposed to work both in practical and legal terms from the perspective of the party-appointed arbitrators as well. Two questions help to set the scene in which the respective legal teams confronted each other. Firstly, what litigator worth their salt would not instinctively assume that in the event of a disagreement between party-appointed arbitrators, what their opponent was willing to endorse would be against their own client's commercial interests? Secondly, what reasonable litigator would appoint an arbitrator whose judgment they trusted in relation to a significant commercial dispute, and then glibly ignore that same arbitrator's concerns that there was a risk of an unsatisfactory panel being appointed? The identity of the third arbitrator, and the ability of the party-appointed arbitrators and/or their lawyers to influence them in the course of the arbitral proceedings are no doubt significant concerns to the parties in the heat of the arbitrator appointment process. It has been observed that: "*An old axiom, which many practitioners believe, is that arbitrations are won or lost in the panel selection process.*"[13]

56. Of more fundamental importance is the question of how does it appear that the clause in question was supposed to operate as far as the role of the two party-appointed arbitrators in selecting the third arbitrator is concerned. MPCL

[13] Paul M. Hummer, '*The Law of Arbitration Selection*' (2007) 14 ARIAS US Quarterly Number 1, page 2.

complained that Montpelier's application represented an attempt to procure a breach of the arbitration agreement it was bound by. It is arguably implicit in every agreement to refer disputes to arbitration, that the panel should not only meet the minimum express qualifications, but should also be suitable for the dispute in question. In some cases one might expect the chairman of a panel of three to have some familiarity with the proper law of the relevant contract. But this point would have greater practical significance where the dispute in question was substantially legal in nature; in a case where the central dispute turned on matters of industry practice, legal knowledge might not be required at all. So one would reasonably expect that the parties would in many cases make representations of a general character to the persons responsible for appointing a non-party arbitrator as to any attributes the candidates for appointment should have over and above the general qualifications prescribed in the clause which were negotiated before the particular dispute arose. One would also reasonably suppose that even where two party-appointed arbitrators are required to appoint a third arbitrator by a mandatory random selection process, some discussions might take place with a view to reaching a broad consensus as to what special qualifications candidates ought to possess. As mentioned above, the range of potential qualified persons is sufficiently broad to suggest that a "horses for courses" rule ought to be applied when the third arbitrator is being selected, if not when the party appointed arbitrators are being selected as well.

57. Mr. Riihiluoma suggested that Mr. Kellett's position as endorsed by Montpelier was inconsistent with the fact that the parties had agreed to the consensual option of the ARIAS-US Umpire Selection Procedure, which was as much a random process as the lot-drawing last option procedure. But the ARIAS procedure which culminates in the drawing of lots in practice seemingly entails informal consultations between the party-appointed arbitrators. This was the view of a US arbitration specialist (who now happens to be involved in this case) writing in a prominent arbitration journal a few years ago:

> "*Under this structure, absent agreement on an umpire, each party and its party-appointed arbitrator customarily confer in the selection of a slate (usually, three) of umpire candidates, which will be cross-struck to produce one contender from each list. A random selection is then made between them. This process is generally effective but resort to the courts is occasionally needed.*" [14]

58. Obviously clause 27 of the Policies falls to be construed on its own merits and the ARIAS procedure has no direct relevance in this regard. But it still supports in an illustrative way the otherwise common sense view that suitability is a potentially relevant concern which may be married with an otherwise random and purely mechanical selection process. Although this further point was not advanced in argument, it also seems obvious that in the context of a Bermudian arbitration

[14] David A. Attisani, '*Panel Selection and Grounds for Disqualification of Arbitrators in Reinsurance Arbitration*' (2004) 11 ARIAS-US Quarterly Number 3, page 21.

taking place under the supervisory umbrella of the Model Law, the legal experience of the arbitral tribunal may have enhanced significance, because no appeals exist in respect of most ordinary errors of law. It does not follow that Bermuda law experience would be a relevant consideration in the case of all international commercial arbitrations taking place in Bermuda. Mr. Riihiluoma correctly pointed out that the 1993 Act was designed to promote Bermuda as an international arbitration centre. Nevertheless, the following assertions in paragraph 16 of the Second Andrewartha Affidavit support an arguable case that honouring the clause requires the selection of a third arbitrator with Bermudian arbitration experience:

> "*…Montpelier believes it is imperative that the third Arbitrator have experience of handling Bermudian arbitrations and/or is familiar with Bermuda law. Montpelier wishes to maintain the integrity of the Bermudian arbitral process chosen by the parties….Additionally, given the legal issues, the panel must address matters of Bermudian law that arise. It is critical that the third Arbitrator is able to understand the issues in connection with rescission or reformation of the contract as sought by MPCL…*"

59. This analysis serves to illustrate that my provisional view that it was obvious that the arbitrators were required to apply the lot-drawing mechanism with respect to any qualified candidates, without regard to suitability over and above the minimum qualifications and was based on an overly simplistic reading of the arbitration clause. What the clause means does not fall for final determination. Rather, what the clause arguably means in its commercial context is relevant to the question of whether it is sufficiently clear that Montpelier, in failing to assent to MPCL's interpretation, has been flagrantly flouting the parties' contractual bargain so that the present application ought properly to be refused. This question must be answered in the negative. The application when filed was somewhat premature and not strictly necessary, but was neither frivolous nor vexatious, nor filed for an improper collateral purpose. It was not truly based on an attempt to breach their contractual obligations, because the application was based on the premise that the contractual mechanism had broken down. Nevertheless, Montpelier's legal advisers declined an invitation to take the deadlock pot off the stove on the grounds that it had not yet come to a boil. They insisted on leaving the pot on the stove but, at this juncture, did not turn up the fire.

60. For reasons which have already been set out above, it is now clear that the approach that I adopted at the conclusion of the March 11, 2008 hearing was erroneous and that I ought to have granted the present application at that stage. Swayed by Mr. Riihiluoma's advocacy, I failed to give due consideration to the fact that the two arbitrators had not managed to resolve their differences over a period in excess of three months, and that the very fact that MPCL was seeking the Court's assistance to enforce the contractual appointment machinery was cogent evidence that it must have broken down. In addition, I failed to appreciate

that the deadlock was substantially based on Mr. Kellett's concerns about the suitability of his counterpart's candidates. While it was obvious that the lot-drawing procedure was intended to be a mandatory fall-back selection procedure, it is nonetheless arguable that the clause implied a duty on the party-appointed arbitrators to seek to reach agreement on the suitability of candidates to be entered by each of them into the lot-drawing procedure, having regard to the nature of the relevant dispute. My Ruling did not assist the arbitrators in resolving this important issue and, more importantly still, this Court had no jurisdiction under Article 11(4) to seek to assist the arbitrators to resolve any dispute in any event. But MPCL's counsel raised serious concerns about the manner in which Montpelier's legal advisers conducted themselves after my adjournment decision which must still be considered.

61. At this juncture, Montpelier's legal advisers seemingly decided to throw caution to the winds, and bring the deadlock pot to a boil. Having previously taken the somewhat curious position that the parties' views as to the mandatory or permissive status of the appointment provisions were irrelevant[15], their London solicitors forwarded my Ruling of March 11, 2008 to the arbitrators stating that their Bermuda co-counsel opined as follows: (a) the appointment procedure was not mandatory; (b) the views of the parties on the clause were irrelevant; and (c) even if the Bermuda Court did decide that the procedure was mandatory, it had no power to compel the arbitrators to apply the procedure. This letter, understandably, provoked a volcanic response from MPCL both through Mr. Riihiluoma by way of argument and by way of the Second Attisani Affidavit. The outrage was in my judgment understandable for the following reasons.

62. The Clyde and Co letter apparently achieved its purpose of encouraging Mr. Kellett to hold fast to his position that he did not have to draw lots unless he wished to. Montpelier's lawyers themselves had helped to finish cooking the deadlock goose. In the course of the resumed hearing, I indicated to counsel that it seemed to me that any misconduct relating to this communication to the arbitrators might well impact on the disposition as to costs if it did not constitute grounds for refusing to grant relief altogether.

63. Admiration for the art of lawyering is perhaps diminished by the fact that legal ethics appear to possess a flexibility and fluidity which are not easily digestible by the non-legal world. Categorizing particular litigation strategies as an abuse of the process of the Court is invariably easier to allege than it is to substantiate. As an American legal writer has sagely observed:

> *"Litigation practice cultivates the exercise of restraint in moral judgment, the ability to hold conflicting moral judgments*

[15] It is difficult to see what can be wrong with *inter partes* communications being made by way of submissions to the incompletely constituted panel aimed at assisting the party-appointed arbitrators to complete the appointment process, provided sensible parameters are agreed between the legal teams as to the form such communications should take.

simultaneously, the understanding that the experience of moral dissonance may be appropriate in that it accurately reflects real conditions, and the awareness that the resolution of moral conflict may be self-deceiving."[16]

64. These observations are instructive when considering the complaint that the Montpelier's communication to the arbitrators after this Court's March 11, 2008 adjournment Ruling was so improper that it constitutes grounds for refusing substantive relief. In paragraph 2 of my March 11, 2008 Ruling, I stated as follows:

> "*The application was argued this morning resulting in my deciding to order that the application should be adjourned. I promised to provide short reasons for this decision which the parties would be at liberty to communicate to the two party-appointed arbitrators in the hope that this judgment might assist them to appoint a third arbitrator in accordance with the third appointing mechanism provided under the arbitration clause…*"

65. Bearing in mind that Montpelier's position on December 14, 2007 was that the parties' views as to what the clause meant was irrelevant, I envisaged that my neutrally-worded Ruling would simply be forwarded to the arbitrators without any substantive comment from either side. In any event, I assumed that some informal understanding would be reached between the legal teams as to what form the communication would take. This certainly appears to have been the expectation of MPCL's legal team. In the event, it seems that Montpelier's London solicitors unilaterally sent an argumentative letter setting out the views of their Bermudian attorneys to the arbitrators together with my March 11, 2008 Ruling. Naively, as it now seems, I gave no explicit directions as to the conditions upon which this Ruling was to be communicated to the arbitrators. No directions were in any event sought. Nor do I recall, it is also necessary to point out, giving any indication that the parties were constrained from making any representations to the arbitrators when communicating my Ruling. So there is no strict legal basis for concluding that the March 13, 2008 Clyde and Co letter amounted to any form of contempt of Court.

66. Nevertheless, I was left on March 17, 2008 with the distinct feeling that Montpelier's legal advisers had decided to deliberately undermine the Court's attempt to collect evidence which had not been "tampered with" as to what the position of the arbitrators was as at the initial hearing on March 11, 2008. It is true that the arbitrators were not witnesses in the midst of giving evidence engaging the prohibition on witnesses discussing their evidence while they are on the stand. But it seemed to me to be obvious that the purpose of the adjournment was to allow the Montpelier to either (a) assist the arbitrators to

[16] Duffy Graham, '*The Consciousness of the Litigator*' (University of Michigan Press: Ann Arbor, 2005) page 115.

make the appointment pursuant to the clause, or (b) obtain evidence that confirmed that the arbitrators were indeed deadlocked and were not simply awaiting guidance from the parties, in which case the court would make the requisite appointment. This certainly was clear to the MPCL's US attorneys, who were obviously eager to accept the Court's support for honouring the appointment procedure provided for under the arbitration clause.

67. As already noted, the letter to the arbitrators made three main points. Mr. Riihiluoma fairly complained that the suggestion in the March 13, 2008 letter to the arbitrators that the lot-drawing procedure was not mandatory was a point which must have been known to be a bad point. Mr Woloniecki artfully retorted that the point was one which was "available" to be made. This is technically correct in that it is probably rarely (if ever) improper for a lawyer to advance a bad legal point which is not actually known to be wrong, and is rarely possible to prove that a new legal point is in fact erroneous until it has been finally determined by a court or other tribunal. The advancing of the bad point in the present case on March 13, 2008 was in any event qualified, because immediately after the "not mandatory" point was made, it was stated that the parties' views were irrelevant. This second point was surely disingenuous as it was patently contradicted by the views set out in the same letter. Finally, the correspondence cake was iced with the technically and substantially correct third point that the Court's views on the status of the appointment provisions were irrelevant, because the Court had no power to enforce the provision if it found that it was compulsory.

68. I am bound to find that the March 13, 2008 letter clearly made it more rather than less likely that Montpelier's party-appointed arbitrator would hold fast to what subsequently emerged (from his March 19, 2008 email) as his likely original position. It is therefore clear as a result that the unilateral sending of the letter flew in the face of the spirit if not the letter of this Court's adjournment Order. However, Mr. Kellett's March 19, 2008 email, read together with all other relevant evidence before the Court, makes it clear that when the Court adjourned on March 11, 2008, a genuine deadlock already existed. The effect of the illicit unilateral March 13, 2008 communication was not to create a basis for the present application without which it could not succeed. Rather it undermined the possibility of a compromise which might have avoided the need to return to Court. So while the Montpelier has added fuel to the deadlock fire, it has not through its own machinations created the deadlock which it asks this Court to break.

69. Montpelier's actions in (a) filing a premature application in December, and (b) in March, 2008 encouraging the hardening of the deadlock which it now seems clear already existed, rather than seeking to explore ways to break it, are clearly matters which bear on the disposition of costs, but not on the merits of the application, having regard to the peculiar statutory context of the present case. Refusing the application altogether would, in my judgment, fly in the face of the strong public

policy in favour of supporting recourse to arbitration proceedings which underlies the Model Law generally and Article 11 in particular.

Appointment of Arbitrator

70. The statutory criteria to which I must have regard in making the appointment under Article 11(5) of the Model Law are (a) the contractually agreed qualifications, (b) independence and impartiality, and (c) nationality. Montpelier, in its initial application, placed the *curriculum vitae* of Mr. Kellett's first three candidates before the Court. No similar details were made available in respect of the candidate said to possess Bermuda law experience proposed on April 16, 2008 by MPCL[17]. Mr. Riihiluoma fairly conceded that Mr. Michael Collins QC was the most suitable of the three candidates proposed by Mr. Kellett. In my judgment, he is obviously most suitable, no questions arising as to his basic qualifications for appointment under the clause. I appoint him as the third arbitrator.

71. As an English QC, he will obviously be familiar with Bermudian insurance and reinsurance law, which is substantially the same as English law. He also has experience of Bermuda arbitration law. He is a member of ARIAS-US and he is now apparently resident in Maine and a Special Legal Consultant to a US law firm. Born in Scotland, he was schooled for ten years in Southern Africa. Mr. Collins' independence and impartiality in a dispute between Bermudian and Barbadian companies represented by lawyers in Bermuda and London (on the one part) and Bermuda and Boston (on the other part) cannot be sensibly doubted. Bearing in mind that one arbitrator is British and the other American as well, he seems ideally suited as third arbitrator to mitigate the effects of any cultural biases which the party-appointed arbitrators may be perceived to have.

Costs

72. The costs of the present application may conveniently be considered in relation to two periods. The first period is from when the application was filed on or about December 18, 2007 until the conclusion of the first effective hearing of the Originating Summons on March 11, 2008. The second period is from March 12, 2008 until the conclusion of the resumed hearing on April 16, 2008. Although the ultimate result is the same, I shall consider the position as regards these two periods separately.

73. The application was essentially premature and Montpelier for tactical reasons elected not to cooperate with the MPCL in making submissions to the arbitrators which might have either (a) resolved the deadlock, or (b) provided a clearer basis for the application which was in fact made. On balance, and although I initially considered that these costs should be awarded to MPCL, to be taxed if not agreed, on the standard basis, no order as to costs is made in respect of the December 18-

[17] Reference was made at page 5 of Exhibit "DAA2" to the Second Attisani Affidavit to the name of an executive with a Bermuda reinsurance company in a company listing. No biographical data was provided.

March 11, 2008 period . While Article 11(4) encourages the Court to make the appointment when a deadlock is found to exist, the underlying policy of party autonomy requires the parties to use their best endeavours to make the contractual appointment procedure work before seeking relief from the Court. In my judgment, it was unreasonable for Montpelier's legal advisers to rush to Court without seeking to reach a compromise on the lot-drawing process. It would in the circumstances only have been reasonable for them to file the application if they had proposed a compromise on the suitability of candidates issue which had been rejected by their opponents. On December 12, 2007, Choate Hall & Stewart made the following reasonable request:

> "*Please let us know as soon as possible whether Montpelier Re will cooperate in executing that Process going forward. If not, please detail how Montpelier Re contends the Treaties operate in the case of a deadlock, so that we can determine how best to proceed.*"

74. Clyde & Co's December 14, 2007 reply did not respond to this request for cooperation at all. It merely repeated an earlier verbal proposal that "*we advise the party appointed arbitrators that we relieve them of this responsibility and this matter be jointly referred to the appropriate judge in Bermuda who will, doubtless, appoint a suitable candidate for us.*" On December 18, 2007, the same date the application was filed, the MPCL's attorneys complained by way of response to the December 14, 2007 Clyde & Co letter:

> "*If we have to present this issue to a Court, we will ask the Court to enforce the parties' bargain and institute the agreed-upon process detailed in the arbitration clauses. Whether we need to do so depends on whether Montpelier intends to challenge our interpretation of the appropriate procedures, which we spelled out for you in or December 12, 2007 letter. The treaties require the selection of a third arbitrator via the drawing of lots. You have thus far refused either to accept that procedure or to challenge it. Montpelier is now required either to comply with its obligation to proceed by cross-strikes, or to repudiate it.*
>
> *Accordingly, please clearly state Montpelier's position on this rudimentary issue, so that we can determine whether we have a dispute—and, if so, the exact nature and scope of any disagreement.*"

75. It is not obvious that if Montpelier's solicitors had responded to this repeated request for cooperation by suggesting that they would be willing to make a joint submission to the arbitrators agreeing that the procedure was mandatory if the MPCL's attorneys agreed that the candidates should all have Bermuda arbitration experience that such a proposal would have been immediately accepted. But in my judgment it is possible that some compromise might have been reached, despite the fact that the MPCL's US attorneys clearly felt that this Court's powers of intervention were broader than they in fact are. In my judgment, they ought to

have at least attempted to cooperate, and had they done so it is possible that the costs of present proceedings might have been avoided. The Hong Kong High Court dealing with an application under Article 11(4)(a) of the Model Law awarded indemnity costs in favour of the applicant because the respondent ought to have cooperated to avoid the need for court intervention. In *China Ocean Shipping Co.-v- Mitrans Maritime Panama SA* [1994] 2 HCK 614, Leonard J held as follows:

> "*Mr Rostron asks for an order for costs on an indemnity basis. Mrs Thomson, who appears for the defendants, says that this case is no different from any other case where one party is not cooperating with the other and that whilst an order for costs is appropriate, there is nothing to suggest that this case should be treated as being in any way different from the normal, run-of-the-mill case, so that the appropriate order is for costs on a party and party basis. She, quite rightly, says that there is no authority for the proposition that, in this particular class of cases, there should be an order for costs on an indemnity basis and she further says, quite rightly, that each case must be decided on its merits and that an order for costs on an indemnity basis is an unusual one and there should be justification for it.*
>
> *Having considered the submissions I have heard today and the particular circumstances as revealed by the affirmation filed by Mr Rostron together with the documents exhibited thereto, I am of the opinion that this is a case where it would be right to take the course of saying that the costs of the plaintiffs should be taxed on an indemnity basis. It is the modern policy of the courts to encourage parties to honour their arbitration agreements and to discourage them from involving the courts quite unnecessarily. Looking at the particular facts of this case, I consider that the conduct of the defendants was such that it is proper that the plaintiffs should be placed in the position in which they would have been if the defendants had honoured their obligation under the arbitration agreement to appoint an arbitrator without recourse to this court.*"

76. As Montpelier's failure to cooperate contributed to the costs of the present application being incurred but its application ultimately succeeded, the appropriate costs disposition appears to me to be to make no order as to costs in respect of the period from the commencement of the proceedings until the conclusion of the March 11, 2008 hearing.

. 77. As regards the second period, it is true that the Montpelier ultimately prevailed as well. But this Court cannot ignore the fact that the Applicant's legal advisers turned up the fire under the deadlock pot in breach of the expectations implicit in the March 11, 2008 order that they would either maintain the status quo or cooperate with MPCL to take the pot off of the stove. It was an opportunistic and (in terms of relations between the lawyers) an inflammatory step which surely made further cooperation on the appointment issue impossible. The March 13, 2008 letter was sent in circumstances where professional courtesy, at the very least, called for prior consultation between the two sides. As has been observed:

> "*The need for courtesy and co-operation in the conduct of a case, and the potential impact on costs of parties' failure to co-operate should need no emphasis to all who practise in the Commercial Court.*"[18]

78. As in the case of the first phase of the present proceedings, I am bound to have regard to the fact that Montpelier has succeeded and that, had I achieved a better grasp of the true merits of the application in both legal and factual terms in the course of the March 11, 2008 hearing, I would have made the order sought without adjourning. I am also satisfied that the lawyers concerned did not deliberately act in bad faith and were rather guilty of excessive enthusiasm in pursuit of their client's rights. But for these two material considerations, I would have awarded the costs thereafter to the MPCL in any event on indemnity basis. Indeed, this was what I was initially minded to do.

79. However, on balance, the appropriate order is to make no order as to the costs of the entire application.

Dated this 24th day of April, 2008

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KAWALEY J.

[18] '*Report and recommendations of the Commercial Court Long Trials Working Party*' (Judiciary of England and Wales: London, 2007) paragraph 159 (s).